IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1432

DONALD PATRICK THOMPSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IRWIN L. FRAZIN
100 North LaSalle Street
Suite 1015
Chicago, Illinois 60602
Telephone (312) 782-2131
Attorney for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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The Petitioner, Donald Patrick Thompson, prays that a Writ of Certiorari issue to review a final order of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on February 16, 1979.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpts of the transcript in that Court, including the judge's statement granting the motion for mistrial on July 24, 1978 and the judge's statement denying the motion for dismissal on July 25, 1978, are reproduced in Appendix B to this Petition.

The Order of the Court of Appeals is reproduced in Appendix A to this Petition.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit was entered on February 16, 1979. (See Appendix A) This Petition for Certiorari was filed within thirty days from the date aforesaid. The jurisdiction of the Court is invoked under Title 28, United States Code, § 1254(1).

QUESTION PRESENTED

What constitutes prosecutorial overreaching sufficient to bar a second trial under the Double Jeopardy Clause when a mistrial is granted upon the defendant's motion.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

The Fifth Amendment to the Constitution of the United States is involved herein and provides in pertinent part as follows:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

Rule 602 of the Federal Rules of Evidence, Title 28, USC, dealing with lack of personal knowledge by a witness is involved herein and in pertinent part provides as follows:

> "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

STATEMENT OF THE CASE

This case originated on June 8, 1978, with the filing of a one count indictment, in the United States District Court for the District of Nevada, charging that on or about April 16, 1978, at Reno, Nevada, defendant knowingly possessed, with intent to distribute, approximately seventeen (17) pounds of marijuana, in violation of Title 21, United States Code, §841 (a)(1) and Title 18, United States Code, §2. Trial by jury began on July 24, 1978.

A mistrial was granted upon defendant's motion when the government's direct examination of a Special Agent of the Drug Enforcement Administration elicited a statement characterized by the judge as "totally irrelevant to the charge". When the Court ordered a second trial, the defendant moved to dismiss the indictment on grounds of double jeopardy. Arguing that his successful motion for a mistrial was not a waiver of the Double Jeopardy Clause, the defendant offered proof that the motion had been necessitated by the overreaching of the prosecutor.

In disposing of this motion, the Court held an evidentiary hearing at which the prosecutor testified that she was aware of the agent's testimony and believed it relevant to the issue at trial. The agent testified that his sole personal knowledge of the defendant's activities consisted of an unsuccessful attempt to engage in a drug transaction. Based on this testimony, the Court denied the defendant's motion stating that there was no prosecutorial overreach since there was no evidence of bad faith.

The defendant then filed Notice of Appeal under Title 28, United States Code, § 1291, as that statute has been interpreted by *Abney* v. *United States,* 431 U.S. 651 (1977).

On February 16, 1979, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's ruling stating that the finding was not clearly erroneous.

REASONS FOR GRANTING THE WRIT

I.

INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE CONSTITUTES PROSECUTORIAL OVERREACH SUFFICIENT TO BAR RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSE EVEN WHEN THE MISTRIAL IS GRANTED ON THE MOTION OF THE DEFENDANT.

For several years, the Supreme Court has recognized a major exception to the rule that a mistrial granted on the defendant's motion permits reprosecution. If there has been prosecutorial or judicial overreaching, the Double Jeopardy Clause will bar retrial. *United States* v. *Jorn,* 400 U.S. 470, 485 (1971); *United States* v. *Dinitz,* 424 U.S. 600, 607, 611 (1976); and *Lee* v. *United States,* 432 U.S. 23, 32-34 (1977). This principle is grounded in the defendant's right to avoid successive prosecutions which are an attempt to enhance the possibility of conviction, *Green* v. *United States,* 355 U.S. 184 (1957), and the defendant's "valued right to have his trial completed by a particular tribunal", *Wade* v. *Hunter,* 336 U.S. 684, 689 (1949), resolutely affirmed in *Crist* v. *Bretz,* 437 U.S. 28 (1978).

Since the ruling of the Supreme Court in *United States* v. *Dinitz,* supra, the task confronting the lower courts has been to formulate guidelines as to what constitutes "prosecutorial overreaching". Several circuits have dealt with the issues and are in accord that retrial is barred by the Double Jeopardy Clause where prosecutorial overreaching has mandated the defendant's motion for a mistrial. *Morovoqui* v. *United States,* 570 F.2d 862, 864 (9th Cir. 1977); *United States* v. *Martin,* 561 F.2d 135, 138-139 (8th

Cir. 1977); *United States* v. *Wilson,* 534 F.2d 76, 79-80 (6th Cir. 1976) and *United States* v. *Kessler,* 530 F.2d 1246, 1255-1256 (5th Cir. 1976). But only the Fifth and Eighth Circuits have attempted to articulate guidelines. In so doing, they have determined that "prosecutorial overreaching" includes intentional misconduct and gross negligence, but not mere prosecutorial error. *United States* v. *Kessler,* supra; *United States* v. *Martin,* supra; and *United States* v. *Beasley,* 479 F.2d 1124, 1126 (5th Cir. 1973).

The Fifth Circuit found prosecutorial overreaching present when inadmissible hearsay testimony and demonstrative evidence which could not be subsequently connected with the charge was introduced at trial. The Court defined "prosecutorial overreaching" in 530 F.2d at 1256:

> "to find 'prosecutorial overreaching,' the government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice(d) a defendant' causing him to reasonably conclude that a continuation of the tainted proceedings would result in a conviction." *United States* v. *Dinitz,* supra.

Similarly the Eighth Circuit found overreaching and so barred reprosecution when the prosecutor read irrelevant and prejudicial grand jury testimony to the jury, *United States* v. *Martin,* supra. The Court stated in 561 F.2d at 140 that:

> "If the government's actions in reading this irrelevant and highly prejudicial testimony to the jury were not intentionally designed to provoke a mistrial request, at a minimum, they constitute gross negligence. It can best be described as prosecutorial error undertaken to harass or prejudice the defendant—prosecutorial overreaching."

II.

THE STANDARD OF GOOD FAITH APPLIED BY THE FEDERAL COURTS IN THE NINTH CIRCUIT IS IN CONFLICT WITH THE OTHER CIRCUITS AND THE FACTS AT BAR PROVE THAT THE CONDUCT OF THE PROSECUTOR FELL FAR AFIELD OF THIS STANDARD.

In the instant case, the Court of Appeals refused to apply the Fifth and Eighth Circuit guidelines. Moreover, the Court neglected to develop any standards in their stead. The Court of Appeals affirmed the Trial Court's determination that there is no overreach when the prosecutor operates in good faith. This position is contra to the Fifth and Eighth Circuits' determination and shifts the focus from the prejudicial effect on the defendant's freedom of choice and right to a fair trial to the state of mind of the prosecutor. Even under this standard, the instant case should result in the categorical denial of reprosecution. The evidence clearly demonstrates a lack of good faith which goaded the defendant into his action only of requesting a mistrial.

The event at issue is the testimony of Special Agent Fanter of the Drug Enforcement Administration, who testified on direct examination that his investigation of the defendant began in December of 1977, based on information received from an unnamed local police officer regarding traffic in cocaine and marijuana. (Tr. 82-83) As a result of the hearsay mention of cocaine, a substance which was not included in the indictment for which the defendant was currently on trial, the defense moved for a mistrial which was immediately granted. Upon motion for a new trial, the defendant raised a Double Jeopardy claim based on the intentional misconduct or gross negligence of the prosecutor in soliciting such testimony.

Testimony taken at the evidentiary hearing on the motion disclosed that the prosecutor was fully aware of the scope and specifics of the agent's testimony prior to trial. The prosecutor and the agent had conferred earlier regarding his potential testimony and the prosecutor had discussed with the agent which parts of his testimony would be admissible in a court of law.

The prosecutor stated her purpose in placing the agent on the witness stand was to establish that the defendant had knowing possession of marijuana with intent to deliver the same. To establish this, she intended to use a phone conversation which occurred six weeks before the arrest. The gist of this conversation was that the defendant refused to be solicited into engaging in a drug transaction. The prosecutor, fully aware that this was the essence of the agent's testimony, chose to put him on the stand. The agent's admission that he was totally lacking personal knowledge of any fact pertinent to the issues being tried established his incompetence as a witness for the government's case in chief. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Rule 602, Federal Rules of Evidence, Title 28, United States Code. Even without the mention of cocaine, the agent's testimony would have surely been objected to as irrelevant to the case at bar. The Trial Court in ruling on the defendant's double jeopardy motion specifically reserved comment on the admissibility of the testimony if the interrogation had continued (Tr. 124).

The prosecutor's conduct in introducing the agent's testimony is suspect despite her disclaimers as the testimony is so obviously immaterial and irrelevant. Knowing

that the testimony which would be elicited would be inadmissible, highly prejudicial hearsay evidence, she deliberately queried the agent regarding this area thus forcing the defendant to request a mistrial. Whether this was done with the intention of manipulating a mistrial or was the result of gross negligence, the defendant was goaded into requesting a mistrial. The prejudicial effect of the testimony was such that the Trial Court found it necessary to grant the mistrial rather than attempt to limit the impact of the testimony (Tr. 84).

Doubts on the prosecutor's good faith are also cast by the method of testimony of the agent as well as its content. The agent testified that he had been so employed for approximately seven years and that he had testified in federal court on numerous occasions. In the course of his duties he had been instructed on the admissibility of evidence and methods of testifying numerous times. Although the agent testified at the evidentiary hearing that he was unaware that his mention of cocaine was improper, his years of experience as an agent who must frequently testify belie this contention. Although not a lawyer, his training and familiarity with courtroom proceedings were sufficient to warn him of the irrelevancy, immateriality and prejudicial effect of his testimony. It is the prosecutor's responsibility to prepare witnesses for the rigors of testifying and in this she totally failed.

The determination of good faith is also contradicted by the deliberateness of the prosecutor's actions. Her claim that she was caught unaware by the agent's testimony is facetious. His testimony was a vital component of her trial strategy which had been foreshadowed in her opening argument. She placed the agent on the witness stand with

full awareness of his testimony and its irrelevant, highly prejudicial nature. To claim as the Trial Court did, that these actions were done in good faith, goes against the manifest weight of the evidence.

It is essential that the Supreme Court grant certiorari to clarify this vital area. The standard imposed by the Ninth Circuit, if indeed there is one, allows even the most egregious behavior to go unrebuked. A deliberate presentment of incompetent prejudicial evidence is sufficient to fulfill the requirement of overreach contemplated but not specified in *Lee* v. *United States,* supra; *United States* v. *Dinitz,* supra; and *United States* v. *Jorn,* supra. Cf., *Giglio* v. *United States,* 405 U.S. 150 (1972) and *Napue* v. *Illinois,* 360 U.S. 264 (1959) (Knowing use of false testimony).

Under the guidelines elaborated by the Fifth and Eighth Circuits, the defendant's motion for mistrial would not constitute a waiver of Double Jeopardy. If the Ninth Circuit had applied the standard of good faith as it claimed to have done, reprosecution would have also been barred. The case at bar involves a serious abuse of trial process deliberately or negligently undertaken to deprive the defendant of his right to a fair trial "completed by a particular tribunal". *Wade* v. *Hunter,* 366 U.S. at 689. As there is disharmony between the circuits and a serious misapplication of a stated standard, it is the responsibility of the Supreme Court to definitely settle the controversy.

CONCLUSION

For the reasons stated above, this court should grant this Petition for Certiorari. The decision of the Court of Appeals in the instant cases raises an important question and is in conflict with the decisions of other circuits and therefore should be reviewed by this Court.

Respectfully submitted,

IRWIN L. FRAZIN
100 North LaSalle Street
Suite 1015
Chicago, Illinois 60602
Telephone (312) 782-2131
Attorney for Petitioner

APPENDIX A

Opinion of the Court of Appeals

FILED Feb 16 1979

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DONALD PATRICK THOMPSON,
Defendant-Appellant.

No. 78-2625
ORDER

Before: CHOY and SNEED, *Circuit Judges,* and KERR,* *District Judge.*

We have reviewed the record and briefs of this case and conclude that the district court properly denied appellant's motion to dismiss the indictment on double jeopardy grounds. The trial court's finding that the prosecution acted in good faith and was not guilty of overreaching or any other form of misconduct is not clearly erroneous.

AFFIRMED.

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* Hon. Ewing T. Kerr, Senior United States District Judge for the District of Wyoming, sitting by designation.

APPENDIX B

Excerpts of District Court Transcript

DIRECT EXAMINATION OF AGENT FANTER

• • • • •

82 By Miss Cohen: Q. Do you know the man seated to my left, Donald Patrick Thompson?

A. I know of him.

Q. By name?

A. Yes, ma'am.

Q. When did the name Donald Patrick Thompson come to your attention?

A. About December of 1976.

Q. Under what conditions did it come to your attention?

A. Through another agent at that time.

Q. Another DEA agent?

83 Q. As a result of any information you received from this agent, did you begin an investigation of Mr. Thompson?

A. About a year later, I did; about December, '77.

Q. Why did you begin in December of '77?

A. At that time I had some information from a local police officer in Chicago that the defendant was bringing amounts of cocaine and marijuana—

Mr. Murray: Objection; motion for mistrial. Reference to specific information, your Honor, received by an agent in Chicago concerning cocaine has no bearing, no relevance to this case. It happened back in 1977. It has no bearing on the charge before the

(Excerpts of District Court Transcript)

Court at the present time. It is highly prejudicial, cocaine being a totally different substance and much more serious substance than marijuana. I move for a mistrial, your Honor.

• • • • •

The Court: You asked the question.

I am sorry, ladies and gentlemen, that you have wasted your time this morning. The information that
84 was just testified to by the witness is entirely irrelevant to the charge contained in this indictment, which is possession of 17 pounds of marijuana with intent to distribute. There is no basis in the law whatsoever for the reception of that type of evidence which this witness has just testified to.

There is no way to erase that information from your minds in your consideration of the evidence in this case, if it should be finally submitted to you for decision. The only alternative I have is to grant the defendant's motion for a mistrial.

• • • • •

111 Q. How was that investigation relative or germane to the charge pending before the Court?

A. Well, he made a phone call to the defendant in March in which they had a conversation. Well, the defendant called him in March, and I think the defendant's reaction to the question, or the conversation that the agent initiated is important to determine whether or not he was possessing marijuana with the intent to distribute.

(Excerpts of District Court Transcript)

Q. The phone call to which you refer occurred in March of 1978; did it not?

A. That is correct.

Q. The testimony you elicited occurred in December of 1977; did it not?

A. Uh-huh.

• • • • •

112 Q. Did you specifically tell him in advance not to testify to anything with respect to cocaine being distributed or being brought from the Reno area to Chicago in 1977?

A. Mr. Murray, I don't know if I used those words or not, but I did specifically discuss with him what he could and could not testify to. We discussed the fact that he could only testify to what had occurred in the airport and the phone conversation he had with the defendant. We went so far as to discuss the fact he had a phone conversation with the defendant's wife and how he could discuss that, but he could only say what he said.

• • • • •

113 Q. What was the purpose of your putting Special Agent Fanter on the stand in the first place at this juncture in the trial?

A. To indicate that he had had a conversation a month before the defendant arrived in the Reno Airport, in which he indicated he wanted to do some "biz" with him, and the defendant had no response to that. He didn't indicate he was shocked, amazed, or anything; he just kind of said, "Maybe I will get together with you."

(Excerpts of District Court Transcript)

Q. Isn't it a fact that the defendant in fact said he would not do business with him?

A. At that time.

• • • • •

DIRECT EXAMINATION OF AGENT FANTER
—EVIDENTIARY HEARING

• • • • •

115 Q. What is your occupation or profession?

A. Special Agent with the Drug Enforcement Administration.

Q. How long have you been so employed?

A. Six years.

Q. In the course of that six-year period, have you had occasion to testify as a witness in federal courts?

A. Yes.

116 Q. On approximately how many occasions have you had such an opportunity?

A. Numerous times.

• • • • •

Q. And did you discuss your testimony with her in detail?

A. Somewhat.

Q. Did she go through question by question and answer by answer?

A. Went through some questions.

• • • • •

117 Q. Well, did you tell her that in December of 1977 you had received some information from a local police officer in Chicago that the defendant was bringing large

(Excerpts of District Court Transcript)

amounts of cocaine and marijuana from Reno to Chicago?

A. Yes.

Q. You told her that?

A. Yes.

• • • • •

119 Q. Do you have any testimony to offer in this case —if you were permitted to continue to testify yesterday, do you have any testimony to offer in this case directly bearing on the question of whether the defendant knowingly possessed 17 pounds of marijuana at Reno, Nevada, on April 16th, 1978?

A. No.

Q. You do not?

A. Not on that date, no.

120 Q. You had no advance knowledge that he was going to Reno, Nevada, on that date and that he would be carrying with him any quantity of controlled substances, do you?

A. I couldn't give you that specific date, no.

Q. All right. You had had a telephone conversation with the defendant back in March of 1978; is that correct?

A. That is correct.

Q. During that telephone conversation, the sum and substance of the conversation is that the defendant refused to do any business with you in the drug business; am I correct?

A. Correct.

• • • • •